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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1974

DOCKET NO. 74-964

One 1973 Cadillac Fleetwood,
S/N 6B69R3Q118916
E.J. Leasing, Inc.
Eugene W. Howard ..... *Petitioners*

V.

United States of America ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully petition the Court to grant certiorari and review a determination by the Court of Appeals for the Eighth Circuit that was rendered on October 22, 1974, forfeiting a 1973 Cadillac to the government, that was the property of Claimants Howard and E.J. Leasing, Inc.

OPINION BELOW

The court below ordered the decision not to be printed or published. A copy of the decision is attached as Exhibit A.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

Eugene Howard, the claimant, was arrested by U.S. Secret Service Agents, on March 16, 1973. The arrest occurred in Little Rock, Arkansas, at 10:00 p.m. Howard was not driving the car at the time of arrest. Later, the same evening, Howard accompanied the arresting officers to his mother's house in Lonoke, Arkansas, a town some twenty to thirty miles from Little Rock, where he pointed out several packages of alleged counterfeit money. The packages were inside the house. The 1973 Cadillac, the object of this case, was parked in a garage attached to the house. No counterfeit money was in the car, nor did the agents have probable cause to seize the Cadillac. The agents, nevertheless, seized the Cadillac.

THE QUESTIONS PRESENTED FOR REVIEW ARE:

I.

UNDER THE FOURTH AMENDMENT, MAY AN AUTOMOBILE BE SEIZED WITHOUT A WARRANT, OR PROBABLE CAUSE, WHERE AN ACCUSED IS

NOT ARRESTED IN THE CAR AND WHERE THE CAR IS PARKED IN A GARAGE, UNDER THE CUSTODY AND CONTROL OF AN INNOCENT THIRD PERSON, AND THE CAR DID NOT CONTAIN CONTRABAND?

II.

UNDER THE FIFTH AMENDMENT, MAY A PERSON BE DEPRIVED OF PROPERTY WITHOUT JUST COMPENSATION, BY VIRTUE OF 49 USC 781, A STATUTE THAT EMBODIES JUDGE-MADE DEODAND CONCEPTS?

CONSTITUTIONAL PROVISIONS APPLICABLE

FOURTH AMENDMENT, U.S.C.

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED . . .

FIFTH AMENDMENT, U.S.C.

* * * NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

STATUTES APPLICABLE

49 USC 781.

STATEMENT OF THE CASE

The 1973 Cadillac was seized from the garage of the mother of Eugene Howard. The agents who found the car did not find any contraband in the car, did not have a writ of attachment, or have probable cause to justify the seizure.

At a forfeiture proceeding on February 28, 1974, in the U.S. District Court, Eastern District of Arkansas, Agent Siatta testified that he had arrested Eugene Howard on March 16, 1973 for violation of the counterfeit laws of the United States. He testified that earlier on that day, about 10:00 a.m., he had met Howard at a motel (R. 19). Howard was driving the Cadillac. Later, that afternoon, at 3:00 p.m., Howard and Siatta met at a motel-restaurant. Saitta received a key to a motel room and went to the room, where he allegedly discovered counterfeited U.S. currency. Howard left the motel in the Cadillac. At a third meeting that day, Saitta arrested Howard. Howard was driving a 1963 Pontiac (R. 15).

On cross-examination, Saitta admitted that he did not see any counterfeit money in the possession of Howard at the 10:00 a.m. meeting on March 16 (R. 18, 19). When Saitta arrived for the second meeting, at 3:00 p.m., Howard was already inside the restaurant (R. 19). Saitta did not see any contraband in the Cadillac on this occasion (R. 20). Saitta admitted he did not know how long the counterfeit money had been in the motel room, and did not know how the money had gotten there. After the 3:00 p.m. meeting, Saitta did not see the Cadillac again that day.

H.W. Duke, a Secret Service Agent testified to events after the arrest of Howard. In short, after the

arrest Howard voluntarily led agents to his mother's house where counterfeited money was recovered from the house. Although the Cadillac was parked in the garage of the house and contained no contraband, the agents seized it.

The balance of the government's evidence consisted of a police officer, who saw no contraband in the Cadillac, the testimony of another agent, and the testimony of an informer, Amos White, an inmate of a Federal institution, who alleged he purchased counterfeit money from Howard at a restaurant to which Howard drove in a Cadillac. The informant wasn't sure whether the car Howard drove was the Cadillac in this case, or one belonging to Howard's wife. Under cross-examination, White fixed the date of the meeting with Howard as January 26, 1973 (R. 61). A final government witness identified the Cadillac by presenting technical information.

In the defense case, counsel called the mother of Eugene Howard, Mrs. Mamie Howard, Eugene Howard, and a final witness, Sula McElroy. Mrs. Howard testified that at no time did she see the Cadillac used to transport the paper packages that Howard placed in her house, and that were later found to contain counterfeit money. Mrs. Howard testified that on the day the Cadillac was seized it was in her possession, and that no contraband was in it.

Eugene Howard testified that no contraband had been carried in the Cadillac. He denied meeting the informant White on January 26, 1973, (R. 119) and explained that for two to three weeks prior to January 27, or 28, he was bedridden and was hospitalized on January 27 or 28. He testified that on the day the Cadillac was seized, he had transported contraband to the motel in a truck (R. 125, 126). This testimony was unrefuted.

Witness Sula McElroy testified that Eugene Howard was hospitalized on January 28, 1973 and was discharged on January 30, 1973. A hospital bill introduced into evidence verified the dates. For the two week period prior to his hospitalization, Mr. Howard had been visited daily by Miss McElroy, at least twice each day.

On rebuttal, the government called Agent Howlett who testified he had Howard under surveillance March 16, but that he did not see any contraband in the Cadillac (R. 153).

ARGUMENT

Since the issues are interconnected, we will discuss them together.

I.

UNDER THE FOURTH AMENDMENT, MAY AN AUTOMOBILE BE SEIZED WITHOUT A WARRANT, OR PROBABLE CAUSE, WHERE AN ACCUSED IS NOT ARRESTED IN THE CAR AND WHERE THE CAR IS PARKED IN A GARAGE, UNDER THE CUSTODY AND CONTROL OF AN INNOCENT THIRD PERSON, AND THE CAR DID NOT CONTAIN CONTRABAND?

At the trial, the government justified their seizure of the Cadillac on the basis of 49 USC 781-788, and on 49 USC 872. For a seizure to have been justified, the agents must have had probable cause at the moment the car was seized. The Record does not show that the agents had probable cause to seize the Cadillac.

Much judicial energy has been expended by this Court in examinations of the validity of automobile seizures, and the necessity for probable cause. Three decisions of the Court are applicable here to demonstrate that the seizure of the Cadillac was unlawful. It follows that if the seizure of the car was illegal the proceeding for forfeiture was null and void.

The three decisions on which we rely are *Coolidge v. New Hampshire*, 403 US 443 (1971); *Chimel v. California*, 395 US 752 (1969); and *Almeida-Sanchez v. United States*, 413 US 266 (1973).

The Fourth Amendment applies equally to searches and seizures, and protects the right of the people to be secure in their person, houses, papers, and effects. The requirement for a warrant to search and seize interposes between the police and the citizen an impartial magistrate who must determine if the right of privacy must yield to the right of search and seizure. *Johnson v. U.S.*, 333 US 10 (1948); *U.S. v. McCormick*, _____ F2d _____, decided July 17, 1974, (CA 9).

A search and seizure question begins with the proposition that the most basic constitutional rule in this area is that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, and are subject to only a few specifically established and well-dilineated exceptions. *Coolidge v. NH*, supra, 403 US at 454-55; *Katz v. U.S.* 387 US 347, 357 (1967). Unless a warrantless search or seizure meets one of these exceptions, the evidence thereby obtained is inadmissible at trial. *Weeks v. U.S.* 232 US 383 (1914); *U.S. v. McCormick*, supra.

In *Almeida-Sanchez v. U.S.*, supra, the stop and search of a moving automobile was allowed without a warrant, a narrow exception established in *Carroll v. U.S.* 267 US 132, but the *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search and seizure. The *McCormick* decision noted: "The fact that the agents made the seizure and search pursuant to an act of Congress does not remove that seizure and search from the purview of the *Katz per se* rule. Unless the statute itself falls within one of the exceptions to the warrant requirement, it must yield to

the right to be secure against searches and seizures." This Court, in *Almeida-Sanchez*, held that no act of Congress can authorize a violation of the Constitution. *Chimel*, supra, limits the search incident to arrest to the arrestee's control. The Cadillac in the instant case was not in the control of Howard, and thus could not be seized by agents without a warrant. *Carroll v. U.S.* supra authorized warrantless seizures of automobiles when two factors are present:

1. The arresting officer has probable cause to believe the automobile contains contraband.

2. There are exigent circumstances associated with the automobile.

Probable cause by itself does not justify a warrantless seizure. In this case, the Record is devoid of any evidence of probable cause to justify the initial seizure.

The Cadillac contained no contraband, and was not in the custody and control of Howard. It could not, therefore, be seized without a warrant. The seizure of the car cannot be justified under the plain view exception, since the car itself was not contraband. *Coolidge v. NH*, supra; *Chimel v. California*, supra.

II.

UNDER THE FIFTH AMENDMENT, MAY A PERSON BE DEPRIVED OF PROPERTY WITHOUT JUST COMPENSATION, BY VIRTUE OF 49 USC 781, A STATUTE THAT EMBODIES JUDGE-MADE DEODAND CONCEPTS?

Statutes 49 USC 781-788, and 49 USC 872 are unconstitutional.

The judge-made concept of deodand that is incorporated into 49 USC 781-788, and 49 USC 872, was a remedy fashioned by English judges long before the enactment of the U.S. Const. and Amendment Five. The Fifth Amendment proscribes the taking of private property for public use without compensation. The explicitness of the Fifth Amendment precludes any interpretation of exceptions to the clear intent of the language. The Congress that wrote and submitted the Bill of Rights to the States for ratification did not hesitate to write an exception into a provision when they intended it. The fifth Amendment does not allow *any* taking of private property without just compensation. Since the law, cited above, permits the taking of private property for public use without compensation, the law is unconstitutional.

SPECIFIC RELIEF REQUESTED

That the Court grant certiorari, reverse the decision of the Court of Appeals and direct them to order the restoration of the Cadillac to Mr. Howard. In the order forfeiting the automobile, the District Court ordered the car delivered to the Secret Service, Little Rock, Arkansas for use by that agency. The return of the auto would present no problem and he can then apply for compensation for wear and tear.

Respectfully submitted,

EUGENE W. HOWARD - 20999-175
Box 1000
Leavenworth, Kansas 66048

PROOF OF SERVICE

I certify that on this date I did place in the U.S. Mails a copy of this petition addressed to:

Solicitor General
Washington, D.C.

December 6, 1974

/s/ Roger L. Woods
Legal Research Assistant
U.S. Penitentiary
Leavenworth, KS 66048

EXHIBIT A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 74-1265

United States of America, Appellee, v. U. 1973 Cadillac Fleetwood S/N 6B69R3Q118916, E. J. J. Leasing, Inc., Eugene Wesley Howard, Appellant.	*	Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: October 14, 1974

Filed: October 22, 1974

Before HEANEY, BRIGHT and ROSS, Circuit Judges.

ORDER OF AFFIRMANCE

The appellant, on appeal, challenges the sufficiency of the evidence to justify forfeiture of his automobile pursuant to 49 U.S.C. §§781-788. Upon a careful consideration of the record and of the briefs of the parties, we conclude that there is no merit to the appellant's contention. It was necessary for the government to show that it had probable cause to institute the forfeiture proceeding. It made such a showing. Thereafter, it was incumbent on the claimant to show by a preponderance of the evidence that the automobile was not used in the transportation of contraband. *United States v.*

[Not to be printed or published.]

Fields, 425 F.2d 883 (3rd Cir. 1970); *United States v. One 1963 Cadillac Hardtop*, 231 F.Supp. 27 (E.D. Wis. 1964). The trial court correctly found that he had failed to meet that burden. Further, the Court has concluded that no error of law appears, and that an opinion would have no precedential value. For these reasons, the judgment appealed from is hereby AFFIRMED without opinion. See Rule 14 of the Rules of this Court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-964

ONE 1973 CADILLAC FLEETWOOD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the government failed to show probable cause that the vehicle in question had been used to facilitate the transportation and possession of counterfeit obligations and that the statute under which forfeiture occurred, 49 U.S.C. 781, is unconstitutional.

After a non-jury civil forfeiture proceeding in the United States District Court for the Eastern District of Arkansas, the court found that the petitioner vehicle, claimed by petitioner Howard, had been used to facilitate the transportation and possession of counterfeit obligations, in violation of 49 U.S.C. 781; it accordingly ordered the vehicle forfeited to the United States. The court of appeals affirmed (Pet. Exh. A).

The evidence showed, and the trial judge found, that petitioner Howard's Cadillac was unlawfully used in January and March 1973 to facilitate the possession and

transportation of counterfeit $20 bills. Amon White testified that on or about January 26, 1973, while in Howard's new, light-colored Cadillac (Tr. 53-61), he purchased $5,000 worth of counterfeit obligations from petitioner Howard. The government showed that on September 29, 1972, Howard traded in his older Cadillac and purchased the car that is the subject of this forfeiture action (Tr. 69-70).

Howard claimed that the sale to White never occurred (Tr. 119). In support of his contention Sula McElroy, a registered nurse and personal friend of Howard, testified that he was ill and confined to his home for the two weeks prior to his brief hospitalization commencing on January 28, 1973 (Tr. 146-150).

On the morning of March 16, 1973, William Carter, an informant, introduced Joseph Saitta, an undercover United States Secret Service agent, to petitioner Howard at the Broadway Restaurant, where petitioner informed Saitta that he had $1 million in counterfeit $20 bills (Tr. 8-10). Since Saitta would not make a purchase until he had examined samples, they arranged a meeting for approximately 3:00 that afternoon at George's Restaurant (Tr. 10).

Howard drove his Cadillac to this meeting, arriving at approximately 3:00 p.m. (Tr. 11, 19-20, 35). After Saitta and Carter joined Howard in the restaurant, he gave Saitta the key to a room in a motel adjacent to the restaurant and told him that the counterfeit bills were under the mattress (Tr. 11-12). After examining twelve sample bills in the motel room and determining that they were counterfeit, Saitta returned to the restaurant and agreed to purchase $200,000 worth for $24,000 (Tr. 12-13). As Howard was making delivery later that evening in another vehicle, agents arrested him and seized two other vehicles that had been used to transport the money (Tr. 15, 29). An agent then accompanied Howard to his mother's home, recovered the remainder of the counterfeit bills, and seized Howard's Cadillac (Tr. 28-30, 86).

Howard admitted that he placed the counterfeit samples in the motel room and that he drove his Cadillac to the 3:00 p.m. meeting at George's Restaurant, but he claimed that he used his pick-up truck to transport the money there at approximately 1:00 p.m. (Tr. 125-126). The motel registration, however, showed that he had rented the room at about 3:30 p.m.[1]

The petition presents constitutional claims that could have been, but were not, raised by petitioners' counsel in the court of appeals. There being no exceptional circumstances, there is no occasion for this Court to consider these claims (see, *e.g., Neely* v. *Eby Constr. Co.,* 386 U.S. 317, 330; *Lawn* v. *United States,* 355 U.S. 339, 362-363, n. 16), which are in any event insubstantial and do not warrant review by this Court on their merits.

Petitioners' contention (Pet. 9-10) that the forfeiture provision of 49 U.S.C. 782 embodies the concept of deodand and takes private property for public use without just compensation, in violation of the Fifth Amendment, was explicitly rejected by this Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 680-690.

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[1]After petitioner Howard had testified that he registered in the motel room at about 1:00 p.m. (to reserve the room for a friend who was coming that evening, in whose name he registered the room) (Tr. 126, 131), his attorney suggested that the registration card be obtained and put in the record (Tr. 132) and agreed to have it obtained and made part of the record without further inquiry (Tr. 155). The district court concluded that the registration time of 3:30 shown on the card impeached Howard's account and corroborated the government's theory. The record contains no explanation of the fact that the time of the registration was after the time of the meeting. One possibility is that Howard, who ate at the motel-restaurant complex every day and knew the motel clerk (Tr. 127-128, 132-133, 135), was permitted to obtain the key to the room on his way to the 3:00 meeting but, in haste, did not register for his friend until the meeting was over.

Petitioners also contend that the forfeiture is invalid under the Fourth Amendment because the agents seized the car without a warrant and without probable cause (Pet. 7-9).[2] This Court has held that the validity of a forfeiture is not affected by the validity of the prior seizure of the property subject to forfeiture. *E.g., United States* v. *One Ford Coupe,* 272 U.S. 321, 325; *Dodge* v. *United States,* 272 U.S. 530, 532. Thus, even if the seizure of the car violated the Fourth Amendment, petitioners' remedies would not include invalidation of the forfeiture.

In any event, the facts recited above amply demonstrate that the agents had probable cause to believe that Howard's car had been the situs of a sale of counterfeit bills and had been used to transport such contraband. Given probable cause, the Fourth Amendment did not require that the agents obtain a warrant in order to seize (but not search) Howard's car. See *Cardwell* v. *Lewis,* 417 U.S. 583, 593-596 (plurality opinion of Blackmun, J.); *Cooper* v. *California,* 386 U.S. 58.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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[2]Petitioner does not challenge here the district court's determination, upheld by the court of appeals, that the evidence in the forfeiture proceeding established grounds for the forfeiture (Pet. Exh. A).